IN THE BOMBAY HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.368 OF 2003

Mr.Pankaj Goshar. ...Petitioner.

vs.

Fortune Equity Brokers (I) Ltd. ...Respondent.

Mr.D.J.Khambata with Burzin Somondy i/b. Vinod Mistry & Co. for Petitioners.

Mr.D.D.Madan with Mr.S.S.Purohit i/b. Purohit & Co., for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 28th March, 2005.

P.C.:-

1. By this petition, the petitioner challenges the Award made by the Arbitral Tribunal of the National Stock Exchange directing the petitioner to pay certain amounts to the respondent. The respondent was the claimant before the Arbitral Tribunal while the petitioner was the respondent. The respondent

herein had submitted the claim on 12.6.2002 claiming from the petitioner an amount of Rs.78,53,439.84/-(Rupees Seventy Eight lakhs Fifty Three thousand Four hundred Thirty Nine and Eight Four paise only). The claim of the respondent against the petitioner was on three counts. There is no dispute that the petitioner was the constituent and the respondent was the broker and there was an agreement entered into between the parties on 10.4.2000. Pursuant to the various trading activities between the petitioner and the respondent, there were various credit balances in the account of the petitioner lying with the Respondent and the group/sister concern of the Respondent trading on the Bombay Stock Exchange viz. Fortune Financial Services (I) Ltd. The first claim of the respondent against the petitioner was that the petitioner had purchased 27000 shares of Saw Pipes Ltd. during 22nd February,2001 in the settlement no.2000/48, through Fortune Financial Services (India) Ltd., a parent company of the respondent who was the Stock broker on Bombay Stock Exchange. According to the respondent in settlement no.2001030 of the National Stock Exchange, on the instructions of the petitioner, the respondent sold 27000 shares of Saw Pipes. According to the respondent, the contract notes for the said transactions were issued. According to the respondent, an amount of Rs.21,63,429.71/- (Rupees Twenty one lakhs Sixty three thousand four hundred twenty nine and Seventy one paise only) remained due and payable by the respondent to the petitioner, but Rs.58,29,400/- (Rupees Fifty Eight lakhs Twenty Nine thousand Four hundred only) was paid by the respondent to the petitioner by a cheque dated 5.7.2001. According to the

respondent, the amount of Rs.36,65,970.29/- (Rupees Thirty Six lakhs Sixty Five thousand Nine hundred Seventy and Twenty nine paise only) was paid in excess by the Respondent to the petitioner and therefore, this amount was recoverable by the respondent from the petitioner.

2. The second claim of the respondent against the petitioner was regarding sale of 95000 shares of Goldstone Technologies Ltd, by the petitioner through the respondent in Settlement nos.62 of 2000, 63 of 2000 of National Stock Exchange and Settlement no.50 of 2000 of Bombay Stock Exchange. According to the respondent, out of 95,000 shares sold by the petitioner, the petitioner had delivered only 50,000 shares and did not deliver 45,000 shares. Thus, 45,000 shares which were to be delivered by the petitioner, but were not delivered, were supplied by the respondent from its own stock and the credit of Rs.26,12,107.79/- (Rupees Twenty Six lakhs Twelve thousand One hundred Seven and Seventy nine paise only) was given to the petitioner by the respondent.

3. The third claim against the petitioner was that in the separate running account maintained by the respondent of the petitioner, the amount of Rs.5,75,000/- (Rupees Five lakhs Seventy Five thousand only) was shown as due and payable by the petitioner to the respondent as on 11.5.2001.

4. According to the respondent as on 20.8.2001, thus the amount of

Rs.68,53,078.08/- (Rupees Sixty Eight lakhs Fifty three thousand Seventy Eight and Eight paise only) was shown in the account books maintained by the respondent, as due and payable by the petitioner to the respondent. In paragraph 20 of the Statement of claim, it was claimed that the transactions on behalf of the petitioner were effected by the respondent upto 20.8.2001 and a letter was sent on 20.8.2001 alongwith the up to date statement of accounts. The statement of accounts shows that the above referred amounts were due and recoverable from the petitioner to the respondent. According to the respondent, the petitioner did not dispute his liability till he addressed a letter dated 23.2.2002 to the respondent and disputed his liability. According to the respondent, thus the dispute between the parties arose on 23.2.2002 and therefore, making a reference on 12.6.2002 was within the period of limitation provided by the provisions of bye-laws of the National Stock Exchange.

5. In the statement of defence, it was claimed that the entire dispute is barred by the law of limitation. According to the petitioner, the period of limitation will commence on the date on which the cause of action arose and not on the date on which allegedly the liability was disputed. According to the petitioner, even accepting the case of the respondent in the statement of claim that in his books of accounts as on 20.8.2001 this amount is shown as due, and if the same is taken to be the date for cause of action, then also the dispute is barred by the law of limitation. This has been decided by the Arbitral Tribunal and in the Award in paragraph no.6(b) the Arbitral tribunal held that the cause

of action arose when the dispute arose, and the dispute arose on 23.2.2002 and therefore, the reference made in June,2002 is within the period of limitation.

6. I heard the learned counsel appearing for petitioner. The learned counsel for petitioner relies on the judgement of this Court in the case of "Poise Securities & Exchange Ltd. Vs. D.V.Lonkar and others, 2000(3) Mh.L.J. 64"; the judgement in the case of "Jagmohan Singh Gujral of Indian Vs. Satish Ashok Sabnis & another, 2004(1) Bom.C.R. 307", to claim that the period of limitation commences from the date of cause of action. The learned counsel for the respondent on the other hand relies on the judgment of the learned single Judge of this Court in the case of "Suresh Kabra & Another Vs. M/s.Trusted Shares & Investments Ltd. & others, 2003(1) ALL MR 823." and the judgment in the case of "Harinarayan G. Bajaj Vs. LKP Securities Ltd. & another, 2004 (4) Bom.C.R. 787" and submits that the period of limitation commences from the date on which the dispute arises.

7. Now to appreciate the rival contentions, it is necessary to refer to the bye-laws no.3 found in Chapter XI of the bye-laws of National Stock Exchange, which reads as under:-

> "(3) All claims, differences or disputes referred to in Bye laws (1), (1A) and (1B) above shall be submitted to arbitration within six months from the date on which the claim, difference or

> dispute arose or shall be deemed to have arisen. The time taken in conciliation proceedings, if any, initiated and conducted as per the provisions of the Act and the time taken by the Relevant Authority to administratively resolve the claim, differences or disputes shall be excluded for the purpose of determining the period of six months."

Perusal of the above quoted provision shows that the dispute can be submitted to the Arbitrator within a period of six months from the date on which the claim, difference or dispute arose or is deemed to have been arisen. I find that the similar clause and similar phrase for the similar purpose has been considered by the Supreme Court in the case of "Shri.Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta, JT 1993(3) S.C.537" The Arbitration clause which the Supreme Court in that case has considered was contained in clause 68 of the Contract. It provided that when any disputes or differences have arisen, the person should approach the Engineer in the first instance seeking reference of it to an arbitration and if the Engineer refuses to act upon or omits to refer the dispute to the arbitration within 15 days from the date of the receipt of notice, then it is open to him to approach a Civil Court for reference to the arbitration. The relevant observations about the arbitration clause are in paragraph no.7 of the judgment, which reads as under:-

> "In this case we have seen that even assuming that the petitioner

had put-forward his claim in July,1979 and the respondent had not acted thereon till November 28,1989, for long 10 years he did not move his little finger to approach the Engineer and later the Court. For the first time on November 28,1989 he issued notice to the respondent to refer the case for arbitration. Clause 68 of the Contract provides that when any disputes or differences has arisen he should approach the Engineer in the first instance seeking reference of it to an arbitration and if the Engineer refuses to act upon or omits to refer the dispute to the arbitration within 15 days from the date of the receipt of notice, then it is open to him to approach a Civil Court for reference to the arbitration. On his own showing cause of arbitration has arisen in July,1979, the petitioner did not take any action from then. On the other hand when notice was issued in November, and sought its leave to rescind the agreement explaining the circumstances. The Court exercised the jurisdiction in permitting the respondent to revoke the arbitration agreement. The question then is whether it is justified?"

The Supreme Court thereafter in paragraph 9 referred to the judgment of Privy Council in the case of "Ram Ramkissendass V. Sassoon (E.D.) & Co., 1929(56) Indian Appeals 128" and the judgment of House of Lords in the case of "Naamlooze Vennootschap Handels-En Transport Maatschappij"Vulcaan" Vs.

A/s.J.Ludwig Mowinckels Rederi, 1938(2) All E.R. 152". The Supreme Court in paragraph no.10 referred to the judgment of House of Lords in the case of "Pegler V. Railway Executive (1948 Appeal Cases 332 at 338)" and observed thus:

> "In Pegler V. Railway Executive (1948 Appeal Cases 332 at 338), House of Lords held that just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forwards after the expiration of the specified number of years from the date when the claim accrued. While accepting the interpretation put up by Atkinson, J. as he then was in the judgment under appeal, learned Law Lords accepted the conclusion of Atkinson, J. in the language thus:"the cause of arbitration" corresponding to "the cause of arbitration" in litigation "treating a cause of arbitration in the same way as a cause of action would be treated if the proceeding were in a court of law."

The principle of law that is laid down by the Supreme Court is to be found in paragraph 12 of the judgment which reads as under:-

> "Therefore, the period of limitation for the commencement of an

> arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued, just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."

Thus, the principle of law laid down by the Supreme Court is that the period of limitation for reference of dispute to arbitration commences from the same date on which the cause of action for institution of a suit arises. This principle of law has been laid down by the Supreme Court in relation to the arbitration clause which also provides for a reference to arbitration on the dispute between the parties arising. Therefore, the clear principle of law laid down by the Supreme Court appears to be that the period of limitation commences, for the purpose of reference of dispute to Arbitrator, on the date on which the cause of action arises. So far as the present case is concerned, it is clear from the pleadings in the statement of claim itself that as on 20th August,2001, the account books of the respondent showed that this amount is due from the petitioner to the respondent and the notice was issued by the respondent to the petitioner enclosing the statement of accounts. Paragraph no.20 of the Statement of claim reads as under:-

> "The applicants say and submit that the transactions were effected by the Applicants for and on behalf of the Respondent up to 20th August,2001, the Respondent was informed through a letter dated 20th August,2001 alongwith statement of accounts upto the date and the Respondent have not made any dispute to the said letter as well as the statement of accounts. It is for the first time the dispute was raised by the Respondent through his letter dated 23rd February,2002 and as such the present claim filed by the Applicants against the Respondent is well within time and not barred by the limitation."

It is obvious that the statement of accounts was forwarded alongwith the letter dated 20th August,2001, though copy of the letter is not available on the record. Even assuming that it is merely a forwarding letter, it is obvious that the statement of accounts was forwarded because that statement of accounts showed that the amounts were payable by the petitioner to the respondent and the purpose of forwarding that statement of accounts was to call upon the petitioner to pay the amount. In other words the conduct of the respondent of sending the statement of account which shows that amounts are due to the respondent from the petitioner, amount to clear demand of the amount by the respondent from the petitioner. There can be no other reason for sending the statement of account. A demand for payment can be made when right to claim the payment accrues. The right of the respondent to demand the payment is the

cause of action of the respondent against the petitioner. In case pursuant to the demand, payment is made, the cause of action would be extinguished. If the payment is not made, an action for recovery of the amount has to be brought within the period of limitation. An action for recovery of the amount is nothing but a step taken for enforcement of the right to demand payment. Accrual of the right to demand payment has nothing to do with the denial of the liability by the other party. If a right to demand payment has arisen, an action can be brought even without demanding the amount. But the holder of the right wants to make the demand before bringing in an action for recovery, he has to make the demand within the period of limitation. If the other party responds to the demand and accepts the liability in writing it will amount to acknowledgment and would extend the period of limitation which has already commenced. If, on the other hand, he disputes the claim or does not respond at all, the action for recovery has to be brought before expiry of the period of limitation which has already commenced on accrual of the right to demand payment. Therefore, as according to the respondent, himself, his right to demand payment arose on 20th August,2001, the cause of action will arise on that date. It is not the case of even the respondent that at any time after the letter dated 20h August,2001 was sent, the petitioner accepted his liability or acknowledged his liability. The letter dated 23rd February,2002 could have extended the period of limitation, had the petitioner admitted his liability by that letter. For accrual of the cause of action, it is not necessary that the person who is alleged to be liable to pay the amount, should dispute his liability in writing. The conduct of the person of

not paying the amount though demanded, itself amounts to refusal to pay the amount. In view of the judgment of the Supreme Court in the case of "Shri.Panchu Gopal Bose Vs. Board of Trustees for Port of Calcutta" referred to above, in my opinion, the position of law is absolutely clear and therefore, it is not necessary for me to refer to the judgments of the learned Single Judges of this Court relied on by both the sides. Because in my opinion, the Supreme Court has laid down the law on the subject clearly and in no uncertain terms that for the purpose of referring a dispute to an Arbitrator, the period of limitation commences on the date on which the cause of action for filing suit for the same claim would have arisen. Therefore, to my mind, it is clear that the Arbitral Tribunal is clearly in error in holding that the period of limitation commenced in February,2002. The period of limitation in any case would commence in August,2001, and therefore, the reference of the dispute made in June,2002 would be barred by the law of limitation. The Award made by the Arbitral Tribunal is therefore, liable to be set aside. It is accordingly, set aside.

8. The respondent is directed to pay costs of this petition to the petitioner, as incurred by the petitioner.

The petition is disposed of.

28.3.2005 ---